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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, AND THEODORE B. GOULD,
Petitioners,

v.

FRED STANTON SMITH, BANK OF NEW YORK, SHUTTS & BOWEN, AND THE UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a trustee appointed by a bankruptcy court as part of a confirmed plan of reorganization to effect a liquidation of a debtor's estate required to file federal income tax returns and to pay federal income taxes?

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PETITION FOR A WRIT OF CERTIORARI

Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould,[1] by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

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[1] Petitioner Miami Center Corporation has no subsidiaries; its parent is petitioner Holywell Corporation, which has no parent corporations or subsidiaries other than wholly owned subsidiaries. No other petitioner is a corporation. *See* S. Ct. R. 29.1.

OPINIONS OF OTHER COURTS

The majority and dissenting opinions of the court of appeals (App. at 1a-16a) are reported at 911 F.2d 1539 (11th Cir. 1990). The court of appeals' denial of rehearing and rehearing in banc (App. at 40a-41a) has not been reported. The opinion of the district court (App. at 17a-27a) is unreported. The opinion of the bankruptcy court (App. at 28a-37a) is reported at 85 Bankr. 898 (Bankr. S.D. Fla. 1988).

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990 (App. at 1a), and a timely suggestion of rehearing in banc (which is treated by the Eleventh Circuit as a petition for rehearing as well, 11th Cir. R. 35-6) was denied on December 21, 1990 (App. at 40a-41a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

1. Section 6012(b) of the Internal Revenue Code of 1954, as amended, provides in part: [2]

> **26 U.S.C. § 6012. Persons required to make returns of income**
>
> * * * *
>
> **(b) Returns made by fiduciaries and receivers.—**
>
> * * * *
>
> **(3) Receivers, trustees and assignees for corporations.**—In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a

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[2] The present provision of the Internal Revenue Code of 1986, 26 U.S.C. § 6012(b) (1988), is identical.

corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) **Returns of estates and trusts.**—Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

* * * *

2. Section 6151(a) of the Internal Revenue Code of 1954, as amended, provides: [3]

26 U.S.C. § 6151. Time and place for paying tax shown on returns

(a) **General rule.**—Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

3. Section 960 of Title 28, United States Code, Judiciary and Judicial Procedure, provides:

28 U.S.C. § 960. Tax liability

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

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[3] The present provision of the Internal Revenue Code of 1986, 26 U.S.C. § 6151(a) (1988), is identical.

4. Section 3713 of Title 31, United States Code, Money and Finance, provides in part:

> **31 U.S.C. § 3713. Priority of Government claims**
>
> (a) (1) A claim of the United States Government shall be paid first when—
>
> (A) a person indebted to the Government is insolvent and—
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed;
>
> * * * *
>
> (2) This subsection does not apply to a case under title 11.
>
> (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

STATEMENT

1. *The Bankruptcy Cases and the Liquidating Trust.*— This case arises out of chapter 11 bankruptcy proceedings filed voluntarily by each of the petitioners. Petitioner Miami Center Limited Partnership ("MCLP") developed the Miami Center, a hotel, office and retail complex in Miami, Florida. Petitioners Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Gould were all partners in MCLP. Petitioner Chopin Associates owned the land upon which the Miami Center was built. Respondent The Bank of New York ("BNY") was the lead mortgage lender to MCLP.

In the bankruptcy court, the debtors and BNY proposed competing plans of reorganization. Although BNY's

claim was undersecured, its plan allowed it to recover 100 cents on the dollar and also allowed it to claim post-petition interest.[4] On August 8, 1985, the bankruptcy court confirmed the Plan of Reorganization ("Plan") proposed by BNY over the debtors' objection. 54 Bankr. at 42-43. *See* App. at 43a. The Plan called for a modified form of substantive consolidation of the debtors' estates and the establishment of a so-called "liquidating trust." *See* App. at 30a; 85 Bankr. at 900. The properties transferred to the trust consisted of all the debtors' assets as defined in 11 U.S.C. § 541(a) (1982 & Supp. II 1984), and the trustee was vested with title to and control over all of that property. App. at 30a; 85 Bankr. at 900. Pursuant to the Plan, the court appointed Respondent Fred Stanton Smith as trustee. The central feature of the Plan was the sale by the trustee of the Miami Center to BNY's designee.

In order to ensure implementation of the Plan, the trustee was provided with a full panoply of powers over the debtors' properties, including, among other things, the authority to "[d]eal with the Trust Property or any part or parts thereof in all ways as would be lawful for any person owning the same to deal therewith . . . ." *See* App. at 43a-46a (setting out portions of the Plan).

BNY's Plan did not provide for the payment of federal income taxes. *See* App. at 7a; 911 F.2d at 1542. The tax liabilities in question arise primarily from two

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[4] *See In re Holywell Corp.*, 54 Bankr. 41, 42 (Bankr. S.D. Fla. 1985), *aff'd*, 59 Bankr. 340 (S.D. Fla. 1986), *appeal dismissed*, 820 F.2d 376 (11th Cir. 1987), *cert. denied*, 488 U.S. 823 (1988); *see also In re Holywell Corp. (Holywell Corp.* v. *Smith)*, No. 88-151-Civ-Aronovitz, slip op. at 4-6 (S.D. Fla. July 21, 1988), *appeal dismissed*, No. 88-5770 (11th Cir. January 9, 1991). The allowance of post-petition interest on BNY's undersecured claim—contrary to 11 U.S.C. § 506(b) (Supp. II 1984) and this Court's decision in *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372-73 (1988)—will be the subject of a petition for a writ of certiorari to review the judgment of the Eleventh Circuit in a related case, entered January 9, 1991.

sources: (1) the taxable gain realized when the trustee sold the Miami Center;[5] and (2) the trust's post-confirmation earnings over the last five years, consisting of interest and other taxable receipts, which now total more than $8.8 million.

2. *This Proceeding—The Bankruptcy Court and the District Court.*—On December 28, 1987, the trustee commenced an adversary proceeding in the bankruptcy court against the debtors, BNY and the United States, seeking a declaration that he was not required to file federal income tax returns and pay federal income taxes incurred. Adversary Complaint ¶ 18. In the alternative, the trustee sought a declaration that BNY should pay any such taxes because: (1) BNY proposed the Plan without providing the means to pay the taxes; (2) BNY failed to disclose the obligation to pay the taxes; and (3) BNY had agreed to indemnify the trustee. *Id.*

The bankruptcy judge, in an order issued April 28, 1988, held that the trustee was not required to file federal income tax returns or pay federal income taxes. The primary rationale put forward in support of this unprecedented decision was the proposition that "the liqui-

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[5] MCLP had a number of investor limited partners who were, of course, not themselves in bankruptcy. MCLP continued to file information returns as a partnership, and its returns were the subject of an audit by the Internal Revenue Service. According to the Service's final report on its examination of MCLP (dated September 6, 1989), the trustee's sale of the Miami Center resulted in a net taxable gain attributable to the partnership interests of Holywell and MCC of approximtaely $58.7 million and a net ordinary loss attributable to the partnership interests of Holywell and MCC of approximately $19.9 million; the sale also resulted in a net taxable gain attributable to Gould's partnership interest of approximately $18.98 million and a net ordinary loss attributable to Gould's partnership interest of approximately $6.4 million. The Internal Revenue Service's October 26, 1987, initial report and the final September 6, 1989, report are set out in the court of appeals' record as Exhibits L and M (respectively) to the Response of Appellant Theodore B. Gould to the Remarks of Professor Robert M. Musselman (filed October 22, 1989).

dating trustee, being a creature of a contract, is a contract trustee." App. at 32a; 85 Bankr. at 901. No source of law indicating any special attributes of or special treatment for a "contract trustee" was identified. Instead, the opinion simply stated "[i]f Congress had intended to hold a . . . contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this . . . ." App. at 33a; 85 Bankr. at 901.[6] The district court affirmed in an unreported decision that adopted the same reasoning, substantially *in haec verba*, although in abbreviated form. App. at 23a-24a. Neither court addressed the trustee's alternative request for a declaration concerning BNY's responsibilities.

3. *The Court of Appeals Decision.*—The United States and the debtors appealed. On September 18, 1990, the court of appeals, in a split decision, affrmed. The majority wrote that "[b]y its terms, section 6012 refers only to trustees who are appointed under *Chapter* 11 of the Bankruptcy Code." App. at 11a; 911 F.2d at 1545 (emphasis added). (In fact, the statute applies, by its terms, to any "trustee in a case under *title* 11 of the United States Code" and not merely to a trustee appointed under *chapter* 11. I.R.C. § 6012(b)(3) (emphasis added)). Building on the equation of *chapter* 11 with *title* 11, the majority concluded, without discussion, that section 6012 "was not intended to apply to a broad range of individuals without regard to the functions which they perform." App. at 11a; 911 F.2d at 1545.

The majority did not review any Supreme Court or court of appeals authority on this subject. Nor did it

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[6] The opinion pointed to no indication—and we are aware of none—that Congress had ever heard of the term "contract trustee," or, if so, that it attached any significance to it, or felt that such a trustee was to be treated differently from any other trustee. Congress had passed a number of statutes (including section 6012 itself) exhibiting its unmistakable command and intention to subject *all* "trustees" operating insolvent businesses to the payment of taxes. *See* pp. 10-12, 15-21, *infra*.

discuss the other statutes that require a trustee or other fiduciary of an insolvent estate to pay federal taxes. Instead, it relied exclusively on a case decided by a bankruptcy court under the now repealed Bankruptcy Act of 1898,[7] *In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980). As Judge Cox explained in his dissent, the *Alan Wood Steel* case involved a disbursing agent under that Act, whose authority was limited by statute to " ' "distribute, subject to the control of the court, the consideration . . . deposited by the debtor." ' "[8] The majority's characterization of the trustee in this case as a "disbursing agent" or "contract trustee," Judge Cox wrote, "denies the reality of [the trustee's] rights, duties and obligations under the Plan. A mere label does not magically transform the liquidating trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a 'fiduciary.' " App. at 14a-15a; 911 F.2d at 1547.

The majority of the court felt it incumbent on it to provide an answer to the obvious question: if the trustee was not going to file tax returns and pay taxes on the gains on the property he sold and the income on the cash in his hands, who was? It said:

> Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes.

App. at 9a-10a; 911 F.2d at 1545.

The court did not furnish any authority for this proposition; it did not define who the "reorganized debtor" was; and it did not indicate who was to pay the taxes on

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[7] Pub. L. 55-171, 30 Stat. 544, *amended by* Chandler Act, Pub. L. 75-696, 52 Stat. 840 (1938).

[8] App. at 15a; 911 F.2d at 1547 (quoting 7 Bankr. at 701, quoting, in turn, former 11 U.S.C. § 737(1) (1976)).

the interest earned by the liquidating trust on the certificates of deposit or Treasury obligations in which it had invested its funds; but presumably the "reorganized debtor" was to do this too.[9]

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case creates an extraordinary tax loophole as to cases in bankruptcy and presents an issue of significant importance. Dating from the First Congress, the clear purpose of federal statutory law has been to make certain that fiduciaries of insolvent estates assume and discharge a duty to pay federal taxes on the operations or income of their estates. If ever there were a case that clearly undermines that long-standing national policy, this is it. *See* pp. 10-15, *infra*. If ever there were a case where a court of appeals has simply misread the plain language of a statute, this is it. *See* pp. 15-19, *infra*. The result of allowing this decision to stand would be to undermine congressional intent expressed not only in section 6012 (b), but in a matrix of other statutes designed to ensure that treatment similar to that ordained by section 6012 (b) occurs in all cases of administration of insolvent business estates by fiduciaries. *See* pp. 19-23, *infra*. Finally, the Eleventh Circuit has put itself in conflict with the approach of every other court of appeals to

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[9] On December 21, 1990, the court of appeals denied petitioners' suggestion of rehearing in banc (which that court also treats as a petition for rehearing, 11th Cir. R. 35-6). On January 17, 1991, Judge Hatchett (the author of the majority opinion) denied petitioners' motion for a stay of mandate, and on January 23, 1991, Justice Kennedy as Circuit Justice denied a similar motion. On January 31, 1991, the bankruptcy court granted a motion of the trustee seeking an order directing him to distribute approximately $8.2 million. The Government has appealed that order. After those disbursements are made, the trust will have remaining assets of approximately $23.8 million.

address section 6012(b). *See* pp. 24-25, *infra*. Review by this Court is plainly warranted.

1. *The Interlacing Statutes.*—Three separate statutes require fiduciaries of insolvent estates to pay federal taxes. I.R.C. § 6012(b); 28 U.S.C. § 960; 31 U.S.C. § 3713. As this Court has confirmed in several cases involving bankruptcy liquidations, each of these statutes requires the payment of federal taxes by a trustee appointed by a bankruptcy court for the purpose of liquidating a debtor's assets.

Section 6012(b)(3) requires a "trustee in a case under title 11" to file federal tax returns. Section 6151(a) requires the person making the return to pay the tax. In *Nicholas* v. *United States*, 384 U.S. 678, 692-94 (1966), this Court held that a trustee appointed by a bankruptcy court to liquidate a corporation was, indeed, subject to penalties imposed by the Internal Revenue Code for his failure to file tax returns.[10] As we explain below, the court of appeals' decision contravenes section 6012(b). *See* pp. 15-19, *infra*.

In addition, 28 U.S.C. § 960 subjects an officer or agent "conducting any business under authority of a United States court" to "all Federal, State and local taxes applicable" to the business. As discussed later, this Court recently held that section 960 requires a bankruptcy trustee to pay state taxes "on the liquidation process." *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 109 S. Ct. 2228, 2235 (1989). *See* pp. 19-20, *infra*. Section 960 applies equally to federal taxes. The liquidating trustee here conducted his business under authority of a United States court.

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[10] The Court observed, "In general, the trustee himself is under a duty to seek out and pay taxes accruing against the bankrupt estate during the bankruptcy itself. See 2 Collier on Bankruptcy 1752 (14th ed. 1964). Cf. Internal Revenue Code of 1954, § 6012(b)(3) (trustee required to make returns of income for bankrupt corporation whether or not the business of the corporation is being operated)." 384 U.S. at 693 n.27.

Still another statute, 31 U.S.C. § 3713, requires a claim of the United States to be paid first in cases where "a person indebted to the Government is insolvent" and "an act of bankruptcy is committed . . . ." 31 U.S.C. § 3713(a).[11] *See United States* v. *Key*, 397 U.S. 322, 324 (1970) (Section 3713 "and its predecessors have given the Government priority over all other claimants in collecting debts due it from insolvent debtors."). To ensure compliance, the statute provides that "a representative" paying any part of a debt before the Government's claim is personally liable for payment of the Government's claim. 31 U.S.C. § 3713(b).

In *King* v. *United States*, 379 U.S. 329, 336-38 (1964), this Court held that the precursor to section 3713 applied even to a disbursing agent under section 337(1) of the former Bankruptcy Act. The Court rejected the disbursing agent's argument that he was not liable for the payment of taxes because he performed "only the ministerial function of paying out the deposited funds in conformity with the court's orders." 379 U.S. at 338. The Court held that "King was possessed of a sufficient degree of control over the allocation among creditors of the assets in his possession to give rise to responsibility under § 192 [now 3713(b)] for seeing that the government priority was paid . . . ." 379 U.S. at 339.[12]

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[11] While the Bankruptcy Reform Act of 1978 which provided for the Bankruptcy Code of 1978 eliminated the concept of "acts of bankruptcy" which had figured in the old Bankruptcy Act, clearly by analogy to that Act the debtors' filing of voluntary cases in bankruptcy, which would have been an act of bankruptcy under the old Act (section 3.a(6), former 11 U.S.C. § 21.a(6) (1976)) fulfilled this requirement of section 3713(a).

[12] As demonstrated below (*see* pp. 20-21; *see also* App. at 43a-46a), the powers of the trustee here not only equalled (see the decision of the court of appeals, App. at 3a n.2; 911 F.2d at 1542 n.2) but far outstripped those given to the disbursing agent by the plan of arrangement in the *King* case and thus the present case is an *a fortiori* one from that case.

In short, Congress has enacted an interlacing set of statutes designed to insure that fiduciaries of all descriptions file tax returns for insolvents and pay the resulting taxes. This Court has held these statutes applicable to various fiduciaries appointed by the bankruptcy courts. Under the decision of the court of appeals, however, this particular trustee somehow enjoys special immunity from the tax obligations universally imposed on insolvency fiduciaries.

How did the court come to this conclusion? It held that section 6012(b)(3) was inapplicable because the trustee was a so-called "contract trustee" appointed pursuant to a plan of reorganization (and analogous to a disbursing agent). App. at 11a-12a; 911 F.2d at 1546. According to the court of appeals, he is, remarkably, *not* a trustee in a case "under title 11." *Id.* Moreover, he is also not subject to liability for paying the taxes as a priority claim under section 3713, presumably because at the same time that he is *not* a "trustee in a case under title 11" for purposes of section 6012(b), nonetheless he *is* a trustee in "a case under title 11" for purposes of section 3713. For the court of appeals to have reached this untoward result, identical words in two statutes *in pari materia* have to mean two different things.

2. *The Consequences of a Judge-Made Exception for Liquidating Trustees.*—The holding below raises the possibility—indeed the probability—that "liquidating trustees" will become the norm in cases where a matter begun as a corporate or business reorganization under the Bankruptcy Code turns into one in which a substantial or total liquidation of the business' property takes place. We may expect that in such cases the payment of taxes out of the assets of the estate will become the exception. If left standing, the court of appeals' decision will materially interfere with the proper administration of both the Internal Revenue Code and the Bankruptcy Code. Here, the Plan, which was proposed by BNY, did not provide for the payment of federal income taxes. *See*

App. at 7a; 911 F.2d at 1544. Notwithstanding this glaring omission, it was confirmed.[13] The court of appeals' decision that, as a matter of law, this trustee is not required to pay federal income taxes has allowed BNY and other creditors to enrich themselves at the expense of the public fisc.

The issue presented by this case is of recurring national importance in bankruptcy cases. Many such cases start as attempts or ostensible attempts to reorganize the business of a debtor under chapter 11 but end in a total or substantial liquidation of the property of the debtor.[14] This case points the way to a new form of tax avoidance: instead of converting such cases to a chapter 7 liquidation or leaving the debtor as a debtor-in-possession to liquidate the business under court supervision, creditors will propose a standard form "Plan of Reorganization," similar to the one here, conveying all the debtor's assets to a "liquidating trustee" charged with liquidating the debtor's property. The "liquidating trustee" becomes a "contract trustee," in the bankruptcy court's expression,

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[13] To be sure, while the Plan did not—as it was required to under the Bankruptcy Code—make provision for the payment of federal taxes, it did not affirmatively purport, if it could: (1) to set aside the requirements of the provisions of the Internal Revenue Code, the Judicial Code, and title 31; or (2) to immunize the trustee from liability to file federal tax returns and pay federal taxes.

[14] No official statistics are kept or compiled concerning the use of liquidation plans in chapter 11 cases. However, in October 1989 the Administrative Office of the United States Courts reported that it had retained the accounting firm of Ernst & Young to conduct a study of chapter 11 cases. Although Ernst & Young did not specifically study the frequency or extent of the use of liquidating plans, it estimated that approximately 20 to 30 percent of the chapter 11 cases reviewed were liquidations. E. Flynn, Bankr. Div., Admin. Off. of U.S. Courts, *Statistical Analysis of Chapter 11* at 12 (October 1989). In fiscal 1989, more than 17,000 chapter 11 cases were filed. Annual Report of the Director of the Administrative Office of United States Courts 362 (1989). This would suggest that 3,500 to 5,000 cases begun in chapter 11 each year turn into liquidations.

exempt from the various federal statutes requiring the payment of federal income taxes.

Indeed, the use of a "liquidating trust" in chapter 11 cases is already of increasing popularity.[15] It will only become more so once it is viewed by creditors as a means of avoiding tax obligations.

The suggestion of the majority of the court of appeals that the "reorganized debtor," not the trustee, is liable for the federal income taxes incident to the trustee's operations not only rewrites the statutes but elects the source least likely to have funds to pay the federal income taxes to be the party responsible for paying them. It facilitates the use of the liquidating trust as a tax-avoidance device. It may be anticipated that in the usual case of a liquidating plan the debtor will be stripped of all or substantially all of its property, and the same placed in the "liquidating trust," as was the case here. Where corporations are involved, this leaves essentially a corporate shell holding the obligation to pay the taxes; and thus, the Treasury is left holding the bag. We may expect to see creditors increasingly resort to the Eleventh Circuit's approach by employing liquidating chapter 11 "plans of reorganization" as a substitute for liquidation under chapter 7 of the Bankruptcy Code.

The widespread harm this decision will cause has already been pointed out by a recent scholarly article. Howard, *The Taxation of Liquidating Trusts, Escrows*

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[15] For several recent cases utilizing a "liquidating trust" in a chapter 11 reorganization, see, *e.g.*, *Toren* v. *Braniff, Inc.*, 893 F.2d 763, 765 (5th Cir. 1990); *In re Highway Equip. Co. (Highway Equip. Co.* v. *Alexander Howden Ltd.)*, 120 Bankr. 910, 911 (Bankr. S.D. Ohio 1990); *In re Crowthers McCall Pattern, Inc.*, 120 Bankr. 279, 283-85 (Bankr. S.D.N.Y. 1990); *In re Mako, Inc.*, 120 Bankr. 198, 200 (Bankr. E.D. Okla. 1990); *In re Mortgage Inv. Co.*, 111 Bankr. 604, 609 (Bankr. W.D. Tex. 1990). (We do not mean to suggest that in these cases the fiduciaries did not file tax returns; the point is that from here on, trustees of liquidating trusts may take the position that they need not do so.)

and Settlement Funds in Chapter 11 Bankruptcy Cases, 64 Am. Bankr. L.J. 403 (1990).[16] The article is devoted almost entirely to a discussion of the district court's decision, affirmed by the court of appeals in this case. *Id.* at 405-23. It concludes that "[t]he decision in *Holywell* seriously undermines the government's ability to collect taxes in these circumstances," *id.* at 417, and that the decision "appears to reflect a questionable interpretation of sections 6012(b)(3) and 6012(b)(4) of the Internal Revenue Code." *Id.* at 410.

3. *The Violence Done to the Statutory Scheme.*

(a) I.R.C. Section 6012(b).—The court of appeals' decision contravenes the plain language of section 6012(b). That statute requires any "trustee in a case under title 11" to file returns and, by operation of I.R.C. § 6151(a), pay taxes. It also covers an "assignee" who "by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation," as well as any fiduciary of a "trust, or an estate of an individual under chapter 7 or 11 of title 11."

The court of appeals held section 6012(b) inapplicable to this trustee. In doing so, it confused *title* 11 (which is the entire Bankruptcy Code), with *chapter* 11 thereof (which applies to certain business reorganizations), premising its decision on the mistaken assertion that "section 6012 refers *only* to trustees who are *appointed under Chapter 11* of the Bankruptcy Code." App. at 11a; 911 F.2d at 1545 (emphasis added). Judge Cox explained in his dissent the patent error of that observation:

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[16] Mr. Howard is an attorney in the Bankruptcy Division of the Adminisrative Office of the United States Courts, although the views he expresses "are those of the author and do not necessarily reflect the views of the Administrative Office or the Internal Revenue Service." *Id.* at 403 n.*.

> The plain language of section 6012(b)(3), however, makes its filing requirements applicable to a 'trustee *in a case* under title 11 of the United States Code . . .' While it is not readily apparent from the face of the opinion, the court seems to have equated the meaning of the phrase 'a trustee in a case under title 11' with the Bankruptcy Code's definition of a trustee *appointed* under 11 U.S.C. § 1104(a) (1979).[17]

App. at 13a; 911 F.2d at 1546 (emphasis and ellipsis by Judge Cox). The court of appeals' error is evident by consideration of other types of title 11 trustees. For example, a trustee may be elected under chapter 7. 11 U.S.C. § 702. Such a trustee, while clearly not a trustee "appointed under chapter 11," is still a "trustee in a case under title 11." Yet, according to the court of appeals, he would not be governed by section 6012(b)(3). The court of appeals' error is even more evident when the trustee in *this* case is considered. He was appointed as part of a plan confirmed by the court pursuant to a provision of chapter 11. 11 U.S.C. § 1129 (Supp. II 1984). Moreover, the bankruptcy court drew its jurisdiction from title 11. 11 U.S.C. § 105 (Supp. II 1984). The Plan provides for retention of jurisdiction over the liquidating trustee. App. at 46a. In fact, in a related proceeding in this Court, the trustee has argued affirmatively that he remains subject to the bankruptcy court's continuing jurisdiction under title 11:

> the confirmed plan of reorganization provides the bankruptcy court with post-confirmation jurisdiction to enter any order necessary or appropriate to carry out the terms of the plan. *See also* 11 U.S.C. Sections 945, 3020(d) [sic, *i.e.*, Bankr. R. 3020(d)].[18]

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[17] That is, a pre-confirmation trustee, appointed in lieu of maintaining the debtor as debtor-in-possession of its estate while a plan is formulated.

[18] Brief of Respondent Fred Stanton Smith in Opposition to Petition for Writ of Certiorari at 18, *Chopin Assocs.* v. *Smith*, 111 S. Ct. 767 (1991) (No. 90-761).

Proof of the bankruptcy court's exercise of continued jurisdiction over the liquidating trustee as its fiduciary was given, once again, only recently. Following the decision of the court of appeals in this matter, the liquidating trustee, evidently celebrating that court's reaffirmance of his freedom from taxation, sought, and obtained, bankruptcy court approval on January 31, 1991, to disburse a substantial amount of the funds in the trust—including the interest on certificates of deposit and other money market investments on which no taxes had been paid—to the creditors. It is obvious from this recourse to the bankruptcy court that the liquidating trustee is and remains a "trustee in a case under title 11," under section 6012(b) of the Internal Revenue Code and, as noted above (p. 10) and below (pp. 19-20), an "officer or agent" "conducting . . . business under authority of a United States Court" under section 960 of the Judicial Code.

Beyond question, therefore, the trustee in this case is a "trustee in a case under title 11." The court of appeals' conclusion that he is not rewrites section 6012(b)(3) to read as if it said "trustee appointed pursuant to 11 U.S.C. § 1104(a) prior to the confirmation of a plan" rather than "trustee in a case under title 11."

The court of appeals' decision also ignores completely the remainder of the breadth of the alternatives in section 6012(b)(3). As Judge Cox pointed out in his dissent,[19] the trustee here also is an "assignee, by order of a court of competent jurisdiction, by operation of law or otherwise," of the debtors' property and, as such, is required to file returns under section 6012(b)(3). This portion of the statute's language is sweeping, with no limiting language restricting the term to only certain kinds of assignees. The trustee is also a fiduciary as that term is defined by I.R.C. § 7701(a)(6) ("a guardian, trustee, executor, administrator, receiver, conserva-

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[19] App. at 15a; 911 F.2d at 1547.

tor, or any person acting in any fiduciary capacity"). As such, he is required under I.R.C. § 6012(b)(4) to file returns of the trust he administers.

Beginning with section 13(c) of the Revenue Act of 1916,[20] Congress has required "receivers, trustees in bankruptcy, or assignees" to file the federal income tax returns of the corporations they are responsible for. This section has been reenacted in every subsequent recodification of the internal revenue laws and is part of the present Internal Revenue Code. The regulations of the Treasury Department promulgated in 1919, under the first reenactment of the provision, construed the statutory language to cover "trustees in dissolution."[21] Article 547 of Treasury Regulations 45 (1920 ed.), explained:

> When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss.[22]

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[20] Pub. L. 64-271, 39 Stat. 756, 771.

[21] Treas. Reg. 45, art. 622 (1919); *accord* Treas. Reg. 62, art. 622 (1922 ed.); Treas. Reg. 65, art. 622 (1924); Treas. Reg. 69, art. 622 (1926); Treas. Reg. 74, art. 392 (1931); Treas. Reg. 77, art. 392 (1933); Treas. Reg. 86, art. 52-2 (1935); Treas. Reg. 94, art. 52-2 (1936); Treas. Reg. 111, § 29.52-2 (1943); Treas. Reg. 118, § 39.52-2 (1953); Treas. Reg. § 1.6012-3(b)(4) (1960). The present regulation, Treas. Reg. § 1.6012-(3)(b)(4) (1990), also interprets section 6012(b) as applying to a "trustee in dissolution."

[22] *Accord* Treas. Reg. 62, art. 548; Treas. Reg. 65, art. 548; Treas. Reg. 69, art. 548; Treas. Reg. 74, art. 71; Treas. Reg. 77, art. 71; Treas. Reg. 86, art. 22(a)-21; Treas. Reg. 94, art. 22(a)-21; Treas. Reg. 111, § 29.22(a)-20; Treas. Reg. 118, § 39.22(a)-20. The present regulation, Treas. Reg. § 1.336-1 (1990), still provides that the rules concerning the realization of gain or loss by corpora-

This contemporaneous administrative construction, which has never been modified in the numerous reenactments of the statute, provides express evidence of specific intent that section 6012(b) requires any trustee appointed "for the purpose of liquidating the assets and paying the debts" of a corporation to file federal income tax returns and pay federal taxes regardless of the mechanism of the trustee's appointment.[23]

(b) *Other Statutes.*—Several other statutes, including 28 U.S.C. § 960 and 31 U.S.C. § 3713, are designed to ensure that taxes are paid in cases in which a business' normal operations have been interrupted by financial difficulties, with the succession of a fiduciary. Both the letter and the intent of those statutes contradict the court of appeals' result here.

Section 960 of the Judicial Code requires "[a]ny officers and agents conducting any business under authority of a United States court" to pay all federal, state and local taxes applicable to the business. Even if the liquidating trustee in this case were not a trustee in a case under title 11 or an assignee—and he is—he would still be an officer or agent "conducting" the debtors' businesses under court authority and subject to all taxes under section 960. As this Court recently explained (in vacating one of the cases upon which respondents BNY and Smith relied in the court of appeals and overturning several others), "[n]othing in the plain language of [section 960], its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the

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tions in liquidation apply to all sales whether made "directly or indirectly (as through trustees or a receiver) . . . ."

[23] Where Congress has, in many reenactments of a tax statute, declined to override a contemporaneous and long-continued administrative construction, the construction "must be deemed to have received congressional approval" and to have the effect of law. *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 283 (1966); *see Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411, 417-18 (1949); *Helvering* v. *Winmill*, 305 U.S. 79, 82-83 (1938).

liquidation process from those taxes the States may impose on the bankrupt estate." [24] Since section 960 applies to federal taxes as well as to state taxes, it is clearly applicable to require a trustee appointed by a federal court in a plan under chapter 11 to be responsible for the payment of federal income taxes "on the liquidation process."

The overriding intent of Congress that *all* fiduciaries of insolvent entities bear responsibility for Federal taxes is further demonstrated by 31 U.S.C. § 3713, which has been part of the legal landscape since the First Congress.[25] That statute mandates that, in cases of insolvency, debts owed to the United States, including taxes, be paid before *any other debts.* To ensure compliance, the statute in its current text provides that "[a] representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." In *King* v. *United States*, 379 U.S. at 338-39, this Court held that statute applicable to a disbursing agent under the former Bankruptcy Act. Indeed, the Court rejected the disbursing agent's argument that the bankruptcy court's order confirming the plan of arrangement did not provide for the payment of the Government's claim. 379 U.S. at 331, 338-39.

This statute now contains an exception for "a case under title 11." 31 U.S.C. § 3713(a)(2).[26] However,

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[24] *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 109 S. Ct. at 2235, 2231 n.2 (vacating *In re China Peak Resort*, 847 F.2d 570 (9th Cir. 1988), and overturning *California State Bd. of Equalization* v. *Goggin*, 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957); *In re Cusato Bros.*, 750 F.2d 887 (11th Cir.), *cert. denied*, 472 U.S. 1010 (1985); *In re Sheldon's Inc.*, 28 Bankr. 568 (Bankr. D. Me. 1983); and *In re Rhea*, 17 Bankr. 789 (Bankr. W.D. Okla. 1982)).

[25] Act of July 31, 1789, ch. 5, § 21, 1 Stat. 29, 42.

[26] Introduced into the statute by Pub. L. 95-598, § 322, 92 Stat. 2549, 2678-79 (1978).

this is clearly not a substantive exception but an effort by Congress to avoid overlap between the two statutes. Section 6012(b)(3) closes the circle by providing that a trustee in "a case under title 11" is required to file returns and pay taxes. So the trustee here cannot have it both ways: if he is a trustee "in a case under title 11," he is required by I.R.C. § 6012(b)(3) to pay the estate's taxes; if not, he is required to do so under pain of paying out of his own pocket under 31 U.S.C. § 3713(a). To hold that the circle is broken—and a trustee appointed pursuant to a bankruptcy reorganization plan can elude the tax collector—is an aberrant and illogical result.[27]

In sum, Congress has enacted a comprehensive system of interlacing statutes requiring trustees, assignees, receivers, and other fiduciaries for insolvents to file returns for and pay the taxes of their charges. As a leading bankruptcy treatise points out, "[t]hese redundant provisions show that it was the clear intent of Congress that a bankruptcy trustee be responsible for all the tax

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[27] Ordinarily, taxes incurred by the estate are given administrative expense priority under the Bankruptcy Code. Here, however, the court of appeals held that the taxes could not be recovered as administrative expenses because they were "post-confirmation taxes." App. at 9a; 911 F.2d at 1544. The device of using the "liquidating trust," instead of liquidating the debtors in the proceeding itself, or ordering the debtors-in-possession themselves to convey title to the Miami Center to BNY or its designee, thus, according to the court of appeals, transmuted what otherwise would have been a priority claim (11 U.S.C. §§ 503(b)(1)(B); 507(a)(1)) against the estate into a claim against the "reorganized debtor[s]" after all of their property had been stripped from them and vested in the trust. Had the court ordered the debtors to convey the Miami Center directly to BNY's designee (rather than approve a "Plan of Reorganization" under which the Miami Center was vested in the liquidating trustee who proceeded to do the same thing) there would not only have been a priority claim of the United States for the taxes due upon the pertinent gain, but that claim would have been superior to BNY's claim for post-petition interest which, inasmuch as BNY was "undersecured," amounted to an unsecured claim. *See* p. 22, *infra*.

obligations of the estate." 4 L. King, R. Babbitt, R. Broude, A. Herzog & R. Levin, *Collier on Bankruptcy* ¶ 8.02 at 8-15 (15th ed. 1990).

The court of appeals' decision contravenes and undermines this system and gives bankruptcy creditors the opportunity to create a creature, the "liquidating trustee," with a license to engage in taxable activities without the filing of returns and payment of taxes—a new form of extra-legislative tax exemption. By immunizing the liquidating trust and its proceeds from obligations to pay federal income tax—whether on capital gains or on ordinary income, such as interest income on the Treasury securities and other money market investments in the trust—this creditor-drafted plan permitted the creditors of the Miami Center to obtain numerous windfalls without competition from the government's claim for federal income taxes. Although the mortgage claim of BNY on the Miami Center property was found to be "undersecured" and thus ordinarily not entitled to interest accruing after the commencement of the case ("post-petition interest"), *see* pp. 4-5 & n.4, *supra*, the Plan of Reorganization provided that such post-petition interest was to be paid in full and indeed that interest was to be paid at a rate higher than that provided for in the governing instruments. *See In re Holywell Corp. (Holywell Corp* v. *Bank of New York)*, 901 F.2d 931, 933 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991). An estate swollen by the retention of moneys otherwise due the federal government for taxes yields itself readily to such payments to the creditors in lieu of those due to the public Treasury.

4. *The Transfer of the Trustee's Tax Obligations to the "Reorganized Debtor."*—Under the court of appeals' decision, apparently, the "reorganized debtor" is to be saddled with millions of dollars of tax liability incurred as a result of the trustee's sale of property and his administration of the trust. This would be true even though the trustee received and exercised control over the

proceeds of sale and the taxable income earned by the trust. In the ordinary case, if the debtor were a corporation and its property substantially liquidated, the only result of this would be a cynical transfer of the tax liability of the trust to a shell corporation without assets. Where, however, as was the case with one of the debtors here, a debtor is an individual who has conducted a business, such a debtor could not possibly enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The court of appeals' decision to this extent would undermine the "fresh start" that is "a central purpose of the [Bankruptcy] Code." *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991). One pair of commentators studied this question and concluded that "[n]o useful purpose is served by shifting to the bankrupt the tax upon the unrealized appreciation in his assets, which appreciation is realized upon liquidation in bankruptcy. Such tax treatment simply would frustrate the theory of rehabilitation of giving a debtor a fresh start . . . ." Krause & Kapiloff, *The Bankrupt Estate, Taxable Income and the Trustee in Bankruptcy*, 34 Fordham L. Rev. 401, 417 (1966). *Cf. In re Bentley*, 916 F.2d 431, 432-33 (8th Cir. 1990) (chapter 7 trustee taxable on gain realized upon sale of debtor's corn and interest on proceeds although the trustee later abandoned the sale proceeds and interest to debtor's secured creditor; alternative of taxing the gain to the debtor rejected as having "the effect of burdening the debtor's fresh start under the bankruptcy law").[28]

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[28] Congress has determined that it is the *estate*, not the emerging debtor, which is responsible (with a lone, clearly demarked, and irrelevant exception) for the payment of taxes incurred in the administration of the bankruptcy proceedings. *See* 11 U.S.C. § 346(b)(1) (state and local income taxes must be paid by individual's estate); 11 U.S.C. § 346(f) (trustee must pay state and local withholding taxes); 11 U.S.C. §§ 1129(a)(7), 726(a)(1), 503(b)(1)(B)(i) (together, prohibiting a plan of reorganization

5. *Conflicts in Approach with Other Circuits.*—The Eleventh Circuit's holding is inconsistent with the approach taken by every other court of appeals to have interpreted section 6012(b), although, to be sure, the Eleventh Circuit did not acknowledge this conflict. The Third, Sixth and Ninth Circuits have all applied section 6012(b) to trustees appointed (like the one in this case) to liquidate real estate and have held the trustees liable for capital gains and other income taxes incurred by the trustees' liquidation activities.[29] The Eleventh Circuit's exception to the clear mandate of the statute for what it called a "contract trustee" conflicts with decisions by the Fourth, Fifth, Sixth, Eighth and Tenth Circuits, all of which have applied section 6012(b) to fiduciaries of a variety of descriptions appointed entirely outside the context of court proceedings.[30] It is also inconsistent with the law of the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Federal Circuits, all of which have held sec-

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from being approved if it would provide for payment of any unsecured claims before any tax "incurred by the estate" (§ 503(b)(1)(B)(i)); *but see* 11 U.S.C. § 346(d) (state and local income tax on individual in Chapter 13 may be imposed only on debtor, not estate).

[29] *See In re I.J. Knight Realty Corp.*, 501 F.2d 62, 66 (3d Cir. 1974); *Louisville Property Co.* v. *Commissioner*, 140 F.2d 547, 549-50 (6th Cir.), *cert. denied*, 322 U.S. 755 (1944); *United States* v. *Sampsell*, 266 F.2d 631, 632-34 (9th Cir. 1959); *United States* v. *Loo*, 248 F.2d 765, 768 (9th Cir. 1957), *cert. denied*, 356 U.S. 928 (1958).

[30] *Tazewell Elec. Light & Power Co.* v. *Strother*, 84 F.2d 327, 329 (4th Cir. 1936) ("liquidating trustee"); *Taylor Oil & Gas Co.* v. *Commissioner*, 47 F.2d 108, 109 (5th Cir.) ("liquidating trustees"), *cert. denied*, 283 U.S. 862 (1931); *Whitney Realty Co.* v. *Commissioner*, 80 F.2d 429, 431 (6th Cir. 1935) ("liquidating agent"), *cert. denied*, 298 U.S. 668 (1936); *Hellebush* v. *Commissioner*, 65 F.2d 902, 903 (6th Cir. 1933) (trustees appointed to effect "final liquidation"); *Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d 619, 620 (8th Cir. 1933) ("trustees in dissolution"), *cert. denied*, 291 U.S. 684 (1934); *First Nat'l Bank* v. *United States*, 86 F.2d 938, 941 (10th Cir. 1936) (trustee for corporation).

tion 6012(b) applicable to court-appointed fiduciaries of a variety of descriptions.[31]

In sum, the courts of appeals, with the singular exception of the Eleventh Circuit, have required fiduciaries—however they come into control of corporate or business assets and whatever their formal titles—to file federal tax returns and pay federal income taxes. As Judge Jerome Frank once observed in discussing the applicability of this statute to one corporation in the process of liquidation, "[p]etitioner suggests no reason why its position should be held so anomalous that it does not fit into a framework in which business units of every description, of long or short duration, must share in the cost of society. This is the price of existence." *O'Sullivan Rubber Co.* v. *Commissioner*, 120 F.2d 845, 847 (2d Cir. 1941). Like the petitioner in *O'Sullivan Rubber*, the Eleventh Circuit offered no reason why a "liquidating trustee" should be treated differently from any other fiduciary. Indeed, it did not even discuss or mention any of these cases.

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[31] *In re Sapphire S.S. Lines*, 762 F.2d 13, 14 (2d Cir. 1985) (trustee appointed in bankruptcy case); *In re I.J. Knight Realty Corp.*, 501 F.2d at 63-66 (receiver appointed under Bankruptcy Act); *Kavanagh* v. *First Nat'l Bank*, 139 F.2d 309, 312 (6th Cir. 1943) (receiver of insolvent national bank); *Pinkerton* v. *United States*, 170 F.2d 846, 847-48 (7th Cir. 1948) ("liquidating receiver" appointed by state court); *In re Bentley*, 916 F.2d at 431-32 (chapter 7 trustee who sold property of the estate, where sales proceeds were abandoned to secured creditor); *United States* v. *Sampsell*, 266 F.2d at 632 (bankruptcy trustee operating under "order of liquidation"); *Scott* v. *Western Pac. R.R.*, 246 F. 545 (9th Cir. 1917) (receiver appointed by federal court) (dictum); *In re Joplin*, 882 F.2d 1507, 1508 (10th Cir. 1989) (trustee appointed in individuals' chapter 7 liquidation proceeding); *Hersloff* v. *United States*, 310 F.2d 947, 950 & n.5 (Ct. Cl. 1962) (trustees appointed by state court), *cert. denied*, 373 U.S. 923 (1963) (decisions of the Court of Claims issued prior to the creation of the Federal Circuit are binding in that Circuit, *South Corp.* v. *United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (in banc)).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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